FILED NOVEMBER 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANANIAS GUMBUS, JR., ET AL.,

Plaintiffs,

v. No. 92-2177-4a

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, and LOCAL UNION 242 UNITED FOOD AND COMMERCIAL WORKERS,

Defendants.

ORDER GRANTING MOTION TO DISMISS AND DENYING RULE 11 SANCTIONS

Before the Court is a Motion To Dismiss An For Rule 11 Sanctions filed by defendants United Food and Commercial Workers International Union and Local Union 242 ("Union" hereinafter). The motion seeks dismissal under Rules 12(b)(1) and 12(b)(6), and moves for Rule

11 sanctions against plaintiffs' attorney for filing the suit. Plaintiffs, who were Union members, bring claims for breach of the duty of fair representation.

Background

Plaintiffs are 220 Union members and former employees of John Morrell & Co. (Morrell"). Plaintiffs worked in Morrell's meatpacking plant in Memphis, Tennessee. In June and July of 1982, Morrell closed its meat-packing plants in Ark City, Kansas and Memphis. In March and September of 1983, Morrell reopened the two plants.

In January, 1984, a group of workers in the Memphis plant filed a § 301 suit under the Labor Management Relations Act against Morrell and the Union in this District. In that case, styled Cummings, et al. v. John Morrell & Co., et al.,

No. 84-2062-HA ("Cummings") the workers alleged, inter alia, that the Union had colluded with Morrell, through secret arrangements to modify bargaining agreement, to deny the worker's of their vested rights upon the reopening of the Memphis plant. The attorney for the Cummings plaintiffs, Asa H. Hoke now represents the plaintiffs in the instant case. The employees at the Memphis plant were divided over whether to join the Cummings lawsuit. Some 138 Memphis workers joined Cummings, but the majority did not.

Earlier, in September, 1983, workers at the Ark City plan filed a § 301 suit in the District of Kansas against the Union and Morrell, Aguinaga, et al v. John Morel & Co., et al., No 83-58-T ("Aguinaga"). Aguinaga asserted nearly identical claims as those in Cummings,

but with respect to the closing and reopening of the Ark City plant.

On January 30, 1987, the Union filed a cross-claim against Morrell in Cummings, alleging bad faith breach of the bargaining agreement. The cross-claim sought lost wages and benefits for all employees who lost rights after the reopening of the Memphis plant, which included the plaintiffs in the instant case. On October 23, 1987, the Union filed an unfair labor practice ("ULP") charge against Morrell on behalf of the membership with Region 13 of the National Labor Relations Board ("NLRB"). On August 27, 1992, the NLRB dismissed the charge on limitations grounds.

The Cummings plaintiffs settled with Morrell and the Union in Cummings in 1988 and 1989. Part of the Union's cross-claim, however, is still alive in

Cummings.

The instant Complaint was filed on February 24, 1992. Plaintiffs herein were among those who did not join the Cummings plaintiffs in their 1984 suit. The present plaintiffs allege the same claims of collusion and concealment against the Union as asserted by their co-workers in the Cummings suit. In addition, plaintiffs allege facts occurring after Cummings was filed which plaintiffs claim constituted a cover-up by the Union and a successful attempt by Union officials to fraudulently dissuade plaintiffs from joining the Cummings suit. Plaintiffs sue for breach of the duty of fair representation.

The Union's motion contends that most of plaintiff's claims are barred by the statute of limitations and that some fail to stage a claim upon which relief

may be granted.

Discussion

The statute of limitations for claims of breach of the duty of fair representation is six months. Del Costello v. International Bd. of Teamsters, 462 U.S. 151, 155 (1983). A duty of fair representation claim accrues, and the six-month period begins to run, "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." Adkins v. International Union of Elec.., Radio and Mach. Workers, AFL-CIO, 769 F.2d 330, 335 (6th Cir. 1985).

When the complaint shows on its face that it has not been instituted within the statutory period, and it is apparent that there is no genuine factual

controversy as to the availability of the defense of limitations, this issue may be resolved on a motion to dismiss. Rohner v Union Pac. R. Co., 225 F.2d 272, 274 (10th Cir. 1955); See, Berry v. Chrysler Corp., 150 F.2d 1002, 1003 (6th Cir. 1954).

The Complaint alleges several wrongful acts by the Union under the rubric of a breach of the duty of fair representation. The Court will consider each alleged wrongful act in turn.

Conspiracy and Concealment

Plaintiffs contend that the Union entered into certain secret "side letter" agreements with Morrell on September 9 and 10, 1982. It is alleged that the agreements furthered a conspiracy between the Union and Morrell to modify the

bargaining agreements unbeknownst to the membership while the Ark City and Memphis plants were closed, then reopen the plants under such modifications which permitted Morrell to pay lower wages and to refuse to recall former employees. Complaint, 5-8. Plaintiffs further allege that the Union actively concealed the conspiracy.

The Court finds that the conspiracy and concealment thereof were discoverable by plaintiffs when the Aguinaga and Cummings cases commenced. The Complaint herein admits that Aguinaga and Cummings alleged the same conspiracy and concealment up to that time as alleged in the instant Complaint, 9. Aguinaga was filed in the District of Kansas on September 23, 1983. Cummings was filed in this District on January 25, 1984. Thus, as of January 25, 1984, at the

latest, the plaintiffs knew, or I the exercise of reasonable diligence should have known, of the conspiracy and concealment which they alleged in the present case.[1] The six-months statute of limitations on the conspiracy and concealment claims thus began to run at the latest on January 25, 1984. The statute had long since run on those claims upon the filing of the instant Complaint on February 24, 1992.

Equitable Tolling

Plaintiffs contend, however, that Union fraud prevented plaintiffs from

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[1]If the filing of Cummings did not put plaintiffs on notice of their claims, the jury verdict in the Aguinaga case in June, 1988, certainly did. In Aguinaga, described in the Complaint as "almost identical" to the present case, the jury found the Union liable for misconduct with regard to the closing and reopening of the Ark City plant. Complaint, 14.

timely filing suit or bringing charges to the NLRB. In this regard, plaintiffs allege that, before and after the plant closing, they were assured by the Union that it was protecting their legal rights, when in fact it was not, in order to dissuade plaintiffs from joining the Cummings action. Complaint, pp. 9-10. The Complaint alleges that the Union told plaintiffs that appropriate legal processes had been filed, and that it would be a waste of their money to join the Cummings case because the Union was pursuing legal claims on their behalf. Id. The Court takes these allegations as true for purposes of this motion.

Fraudulent concealment of facts which would have served as the basis of a fair representation claim may equitably toll the statute of limitations on the claim. Shapiro v. Cook United, Inc., 762

F.2d 49, 51 (6th Cir. 1985). Despite fraudulent concealment, however, a plaintiff must still show that he failed to discover facts that serve as the basis of his cause of action despite due diligence on his part to discover the facts. Id. at 51. "Any fact that should excite [a plaintiff's] suspicion [about his claim] is the same as actual knowledge of his entire claim.'" Chrysler Worker's Assn.. v. Chrysler Corp., 663 F. Supp. 1134, 1152 (N.D. Ohio 1986), aff'd, 834 F.2d 573 (6th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)(quoting Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)). Moreover, the Sixth Circuit made it abundantly clear in Campbell v. Upjohn Co., 676 F.2d 1122, 1127 (6th Cir. 1982), that "additional acts of

concealment...beyond the original fraud do not exempt the plaintiff from the requirement of diligence..." Campbell at 1128.

Plaintiffs have not satisfied the requirement of due diligence to support equitable tolling First, there is no cogent explanation as to why one group of Morrell workers -- plaintiffs herein -- are alleged to have been fraudulently influenced against suing the Union, while fellow workers in the same plant -- the Cummings plaintiffs -- were able to timely sue on almost identical grounds a full eight years earlier. Second, as plaintiff's own Complaint recites, the Union's initial defense in Cummings was that it owed no duty of representation to the former Memphis employees. Complaint,

10. This position of the Union, which was contrary to what the Union was telling plaintiffs, was part of the public record in Cummings. Id.; Plaintiffs' Memorandum, 9. Plaintiffs certainly were aware of their co-workers' case in Cummings. Due diligence required that they keep abreast of that case, which, after all, involved issues profoundly affecting their own situation. Third, and significantly, the Union eventually did file a cross-claim against Morrell in Cummings in 1987 and a ULP charge with the NLRB against Morrell on October 23, 1987. Complaint, 10-11. Clearly, these filings should have aroused plaintiffs' suspicions that the Union had not previously been taking legal action as represented. Thus, even

if the limitations period were tolled up until the filings in 1987, the period ran out 6 months after the 1987 filings.

In sum, lack of the requisite due diligence is affirmatively shown on the face of the Complaint. Plaintiffs cannot expect to file claims, some eight years old, when they delay is attributable to their own failure to diligently protect their rights. Neither can the allegations of Union misrepresentations be turned into a separate fair representation claim when lack of due diligence in discovering such misrepresentation prevented the timely bringing of such a claim. Thus, the limitations period on the conspiracy and concealment claims will not be tolled.

Failure to File Unfair Labor Practices

Charge

The Union in this case ultimately filed an unfair labor practice charge against Morrell in October of 1987, which was dismissed on limitations grounds. Plaintiffs' claim is that the Union refused or delayed bringing a timely ULP charge to further conceal its own involvement in the conspiracy regarding the closing and reopening of the plants. However, this alleged bad faith delay was knowable to the plaintiffs, in the exercise of due diligence, long before commencement of the present suit. Again, the actual filing of the ULP charge in October of 1987, at the latest, clearly signaled that no such charges had been filed before, and thus, that the Union had been misrepresenting its pursuit of actions on behalf of the Memphis

membership. Plaintiffs were already charged with notice at that time of the alleged conspiracy between the Union and Morrell by virtue of the Aguinaga and Cummings lawsuits filed several years before. Thus, the limitations period on the present claim that the Union wrongfully and untimely delayed bringing the ULP charge began to run in October 1987, at the latest, and terminated in April, 1988, four years before the instant suit.

Failure to File Cross-Claim in Cummings

Plaintiffs also charge the Union with having delayed the filing of a cross claim against Morrell in the Cummings action.[2] When the breach of duty alleged

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[2]The claim must be that the Union delayed filing, not failed to file, because in 1987 the Union changed its position and filed a cross-claim. Complaint, 11. Although Count II of

is a union's failure to take remedial action, the limitations period begins to run when it was apparent or should have been apparent that the union would take no such action. See McCreedy v. Local Union No. 971, UAW, 809 F.2d 1232, 1236 (6th Cir. 1987).

The timeliness of this claim is undermined by allegations present in the Complaint. The Complaint alleges that plaintiffs' present counsel, Asa Hoke, in his capacity as counsel for the Cummings plaintiffs, "beseeched" the Union "as early as May 23, 1984" to file cross-claims on behalf of Union members against Morrell in the Cummings lawsuit. Complaint, 10. Furthermore, as

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the cross-claim has been dismissed, other claims therein are still alive. Thus, even with dismissal of the present case, plaintiffs still have an opportunity to recover for wrongful conduct of Morrell regarding the plant closing.

plaintiffs themselves acknowledge, in May of 1984 the public record in Cummings reflected that the Union's position at that time was that it owed no duty of representation to plaintiffs. Complaint, 10.

It should have been apparent to plaintiffs in 1984 that at that time the Union did not intend to file a claim against Morrell. Thus, the limitations period began to run as of May, 1984 at the earliest. At the latest, the cause of action accrued when the cross-claim was filed in 1987, for then the alleged untimely delay in filing since the commencement of Cummings was clearly apparent. Under either theory, the limitations period has run. Again, for reasons already given herein, the Court finds no basis for equitable tolling in plaintiffs' contentions that the Union

misrepresented its efforts to take legal action against Morrell.

Legal Counsel Claim

The legal counsel claim is a variation on the claim of concealment and misrepresentations by the Union beginning in 1982. Plaintiffs claim that they were denied the right to obtain legal counsel because of such concealment. There are no allegations of discipline or retaliation by the Union to thwart legal action. As discussed above, the claims of concealment based upon the Union misrepresentations are time-barred. By extension, the legal counsel claim of a breach of fair representation is also time-barred.

To the extent that plaintiffs may also be alleging a breach of that section

of the labor bill of rights, 29 U.S.C. § 412, which prohibits labor organizations from limiting the right of union members to sue, the result does not differ. A one-year statute of limitations applies, borrowed from Tennessee's statute of limitations for personal injury tort claims. Reed v. United Transp.. Union, 488 U.S. 319 (1989); Allgood v. Elyria United Methodist Home, 904 F.2d 373, 377 (6th Cir. 1990), appeal dismissed, in part, 913 F.2d 1159 (1990). As discussed, the misrepresentations by the Union would have been exposed by the filing of the 1987 ULP charges and cross-claims, which should have excited suspicion that representations by the Union of previous pursuit of plaintiffs' claims were misleading at best. One year thereafter, the statute ran for any claim under the right to sue provision of the

labor bill of rights.

To summarize the disposition of all the claims and individually discussed thus far, they are time-barred and will be dismissed under Rule 12 (b)(6) for failure to state a claim.

Negligence in Pursuing Litigation

The essence of the final claim is that the Union breached its duty of fair representation by untimely filing the October 23, 1987 ULP charge and Cummings cross-claims in a "neglectful and careless" manner. Further, the Complaint indicates that the cross-claims did not seek sufficient damages on plaintiffs' behalf.

The Union argues that these allegations fail to state a claim upon which relief may be granted under Rule 12

(b)(6). Taking all relevant allegations as true and resolving all inferences in favor of plaintiffs, the Court agrees.

Union officials are not expected to be lawyers. Thus, the Union cannot be held liable for any perceived incompetence or defects in the way the Union's ULP charge or the Cummings cross-claims were handled. Stevens v. Highway, City & Air Freight Drivers, 794 F.2d 376, 377-78 (8th Cir. 1986); Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983).

Plaintiffs have made no allegations from which a legal malpractice claim against Union attorneys (who are not named as co-defendants) can be inferred as either having been stated or even intended.

Union Claim for Rule 11 Sanctions

The Union moves that plaintiffs' attorney, Asa Hoke, be cited under Rule 11 for reasonable expenses and attorneys fees incurred as a result of the filing of this lawsuit. The Union argues that Asa Hoke knew or should have known that plaintiffs' claims were time-barred.

Rule 11 of the Federal Rules of Civil Procedure "imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 110 S. Ct. 2447, 2454 (1990). The test is whether the individual attorney's conduct was "reasonable under the circumstances."

McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir.1991)

The Court has given serious consideration to whether Rule 11 sanctions would be appropriate. The memoranda filed indicate a long history of contentiousness in the continuing saga of these disputes. Mr. Hoke has been involved in the litigation between the Memphis employees and the Union for many years. The old claims asserted here presented obvious limitations problems. Due diligence was insufficient.

Nonetheless, Mr. Hoke acknowledges in his response that he anticipated the limitations defense when he filed suit, and the Complaint reflects this. Thus, there was an appeal to equity to toll the statute of limitations. Toward this end, Mr. Hoke presented new allegations showing that the Union misrepresented

facts to deter plaintiffs from suing the Union. Although the argument ultimately fails without any question in this Court's opinion, Mr. Hoke's legal and factual bases for a tolling theory were not so entirely deficient as to reflect incompetence.

The Court thus concludes that Mr. Hoke did not file this suit for an improper purpose, nor was the filing of the suit unreasonable under the circumstances. Thus, Rule 11 sanctions will be denied.

Conclusion

For the foregoing reasons, the Court hereby **GRANTS** the motion to the extent of dismissal and **DENIES** the motion to the extent of Rule 11 sanctions. This case is hereby **DISMISSED**. The Clerk is

directed to enter judgment for defendants United Food and Commercial Workers International Union, AFL-CIO/CLC, and Local Union 242 United Food and Commercial Workers.

IT IS SO ORDERED.

ENTER: This 30th day of November, 1992.

ROBERT M. MCRAE

SENIOR UNITED STATES DISTRICT JUDGE